UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

DON M. SAVAGE,

Plaintiff,

v.

STATE OF NEVADA, *et al.*,

Defendants.

3:17-cv-00469-MMD-VPC

REPORT AND RECOMMENDATION OF U.S. MAGISTRATE JUDGE

This Report and Recommendation is made to the Honorable Miranda M. Du, United States District Judge. This action was referred to the undersigned Magistrate Judge pursuant to 28 U.S.C. § 636(b)(1)(B) and LR IB 1-4. Before the court is plaintiff Don M. Savage's application to proceed *in forma pauperis* (ECF No. 1) and *pro se* complaint (ECF No. 1-1). Having reviewed all documents, the court recommends that the application to proceed *in forma pauperis* be granted, and that this action be dismissed without prejudice, without leave to amend.

I. *IN FORMA PAUPERIS* APPLICATION

Based on the financial information provided in his application to proceed *in forma pauperis*, plaintiff is unable to pay the filing fee in this matter. (*See* ECF No. 1.) The court therefore recommends that the application be granted.

II. LEGAL STANDARD

Inmate civil rights complaints are governed by 28 U.S.C. § 1915A. Section 1915A provides, in relevant part, that "the court shall dismiss the case at any time if the court determines that . . . the action or appeal (i) is frivolous or malicious; (ii) fails to state a claim upon which relief may be granted; or (iii) seeks monetary relief against a defendant who is immune from such relief." 28 U.S.C. § 1915A(b). A complaint is frivolous when "it lacks an arguable basis in either law or in fact." *Neitzke v. Williams*, 490 U.S. 319, 325 (1989). This includes claims based on legal conclusions that are untenable (e.g., claims against defendants who are immune from suit or claims of infringement of a legal interest which clearly does not exist), as well as claims based on

fanciful factual allegations (e.g., delusional scenarios). *Id.* at 327–28; *see also McKeever v. Block*, 932 F.2d 795, 798 (9th Cir. 1991). Dismissal for failure to state a claim under § 1915A incorporates the same standard applied in the context of a motion to dismiss under Federal Rule of Civil Procedure 12(b)(6), *Wilhelm v. Rotman*, 680 F.3d 1113, 1122 (9th Cir. 2012), which requires dismissal where the complaint fails to "state a claim for relief that is plausible on its face," *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007).

The complaint is construed in a light most favorable to the plaintiff. *Chubb Custom Ins. Co. v. Space Systems/Loral Inc.*, 710 F.3d 946, 956 (9th Cir. 2013). The court must accept as true all well-pled factual allegations, set aside legal conclusions, and verify that the factual allegations state a plausible claim for relief. *Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009). The complaint need not contain detailed factual allegations, but must offer more than "a formulaic recitation of the elements of a cause of action" and "raise a right to relief above a speculative level." *Twombly*, 550 U.S. at 555. Particular care is taken in reviewing the pleadings of a *pro se* party, for a more forgiving standard applies to litigants not represented by counsel. *Hebbe v. Pliler*, 627 F.3d 338, 342 (9th Cir. 2010). Still, a liberal construction may not be used to supply an essential element of the claim not initially pled. *Pena v. Gardner*, 976 F.2d 469, 471 (9th Cir. 1992). If dismissal is appropriate, a *pro se* plaintiff should be given leave to amend the complaint and notice of its deficiencies, unless it is clear that those deficiencies cannot be cured. *Cato v. United States*, 70 F.3d 1103, 1107 (9th Cir. 1995).

III. DISCUSSION

Plaintiff is an inmate in the custody of the Nevada Department of Corrections ("NDOC"), and is currently incarcerated at Warm Springs Correction Center. (ECF No. 1-1 at 1.) Proceeding *pro se* and pursuant to 42 U.S.C. § 1983, plaintiff brings civil rights claims against the State of Nevada, Nevada Governor Brian Sandoval ("Governor Sandoval"), Douglas County, Nevada ("Douglas County"), Douglas County District Attorney, and John Does #1–2. (ECF No. 1-1 at 1–2.)

Plaintiff alleges generally that defendants violated his right to bail. (*Id.* at 3–13.) According to plaintiff's complaint, on May 1, 2014, Las Vegas Metro Police Department arrested

and charged plaintiff with first degree kidnapping, "possession of ID for false status", assault without a weapon, and violation of his probation. (*Id.*) After contacting a bail bondsman, plaintiff was advised that he could not be admitted to bail "due to the retake warrant issued by Douglas County for probation violation ...." (*Id.* at 12.) However, plaintiff maintains that he was not sentenced to probation by Douglas County or any other jurisdiction at the time of his arrest, nor ever. (*Id.*). As a result, plaintiff claims that he was "falsely imprisoned" for five-hundred and fifteen days, apparently without receiving a hearing regarding his bail. (*Id.* at 4, 6.)

Based on these allegations, plaintiff claims that defendants violated his Fourth Amendment right to be free from unreasonable search and seizure (Count I); his Fifth Amendment right to a due process hearing regarding his bail (Count II); his Fourteenth Amendment right to due process and equal protection under the laws (Count III); and, his Eighth Amendment right to be free from cruel and unusual punishment (Count IV). (*Id.* at 3–12.) He seeks damages and "presentence confinement credit of (515) days ...." (*Id.* at 9.)

Despite being named as defendants, Douglas County and the State of Nevada are not mentioned in the body of the complaint. (*See id.* at 3–13.) The court now turns to plaintiff's claims: (1) plaintiff's claims against the State of Nevada; (2) his claims against Douglas County, Governor Sandoval, John Doe #1, and John Doe #2; and, (3) his claims against the district attorney.

A. The State of Nevada Is Not Amenable to Suit.

In the caption of his complaint, plaintiff names the State of Nevada as a defendant. (ECF No. 1-1 at 1.) Section 1983 "provides a federal cause of action against any *person* who, acting under color of state law, deprives another of his federal rights." *Conn v. Gabbert*, 526 U.S. 286, 290 (1999) (emphasis added). A state is not a person for purpose of section 1983. *Will v. Mich Dep't of State Police*, 491 U.S. 58, 70 (1989). Thus, the court recommends that plaintiff's claim against the State of Nevada be dismissed because "it lacks an arguable basis in either law or fact." *Neitzke v. Williams*, 490 U.S. 319, 325 (1989). The court recommends that dismissal be with prejudice because plaintiff can make no factual or legal amendments that would expose the State of Nevada to liability under section 1983. *Cato*, 70 F.3d at 1107. Plaintiff's claim for damages

against Governor Sandoval in his official capacity should also be dismissed with prejudice because it is equivalent to a suit against the State of Nevada itself. *Holley v. Cal. Dep't of Corr.*, 599 F.3d 1108, 1111 (9th Cir. 2010); *Flint v. Dennison*, 488 F.3d 816, 824-25 (9th Cir. 2007).

B. Defendants Cannot Be Held Liable Under a Theory of Respondeat Superior

"Because vicarious liability is inapplicable to *Bivens* and § 1983 suits, a plaintiff must plead that each Government-official defendant, through the official's own individual actions, has violated the Constitution." *Ashcroft v. Iqbal*, 556 U.S. 662, 676 (2009); *Maxwell v. Cty. of San Diego*, 708 F.3d 1075, 1097 (9th Cir. 2013) ("[T]here is no respondeat superior liability under § 1983. Rather, a government official may be held liable only for the official's own conduct."). Plaintiff directly states in Count II that "the defendants, district attorney, John Doe #1, John Doe #2, and the Governor" are liable for violating his Fifth Amendment right under a theory of respondeat superior. (ECF No. 1-1 at 5.) Moreover, a careful reading of plaintiff's complaint reveals that his claims against defendants are all premised solely upon the actions of the district attorney. (*Id.* at 3–13.) Plaintiff's allegation that the district attorney filed a false probation warrant is sufficient to go beyond the respondeat superior theory of liability. *See Bd. of Cty. Comm'rs v. Brown*, 520 U.S. 397, 403 (1997). However, plaintiff's claims against the remaining defendants — Governor Sandoval, Douglas County, John Doe #1, and John Doe #2 — are not based upon their own personal participation and should be dismissed. *Id.*

C. Plaintiff's Claims Against the District Attorney Are *Heck* Barred.

Section 1983 is not a backdoor through which a federal court may overturn a state court conviction or award relief related to the fact or duration of a sentence. Section 1983 and "the federal habeas corpus statute . . . both provide access to the federal courts 'for claims of unconstitutional treatment at the hands of state officials, . . . [but] they differ in their scope and operation.'" *Ramirez v. Galaza*, 334 F.3d 850, 854 (9th Cir. 2003) (quoting *Heck v. Humphrey*, 512 U.S. 477, 48 (1994)). When a prisoner challenges the legality or duration of his custody, raises a constitutional challenge which could entitle him to an earlier release, or seeks damages for purported deficiencies in his state court criminal case, which effected a conviction or lengthier

sentence, his sole federal remedy is a writ of *habeas corpus*. *Edwards v. Balisok*, 520 U.S. 641, 648 (1997); *Heck*, 512 U.S. at 481.

The facts upon which plaintiff's claim rest, to the extent intelligible, implicate the legality and duration of his incarceration. Counts I-IV all concern the same alleged event: the district attorney filed a warrant that falsely stated plaintiff had violated his probation. (ECF No. 1-1 at 3–13.) Based on the representations in this warrant, plaintiff was subsequently charged with a probation violation, denied bail, and incarcerated for five-hundred and fifteen days. (*Id.*) Consistent with plaintiff's allegations, judgement in plaintiff's favor would require the court to find that he was never sentenced to probation in Douglas County, which would necessarily imply the invalidity of plaintiff's pretrial detention. *Heck*, 512 U.S. at 481; *see* Nev. Rev. Stat. 178.484 (2018) (requiring that "person arrested for a felony who has been released on probation or parole for a different offense must not be admitted to bail" unless under direction of judicial order or specified administrative body). This claim does not accrue until the invalidity of his pretrial detention for violating his probation is proven at the state level, or called into question by a the issuance of a writ of habeas corpus. *Id.*; *see Martinez v. Allen,* No. 3:16-CV-00034-MMD-WGC, 2016 WL 2643348, at *3 (D. Nev. Mar. 9, 2016), *report and recommendation adopted*, No. 3:16-CV-00034-MMD-WGC, 2016 WL 2595098 (D. Nev. May 5, 2016).

The court notes that the district attorney is likely entitled to prosecutorial immunity from suit because moving to obtain a warrant is "intimately associated with the judicial phase of the criminal process." *See Burns v. Reed*, 500 U.S. 478, 487-92 (1991); *Waggy v. Spokane Cty. Wash.*, 594 F.3d 707, 710-11 (9th Cir. 2010). Dismissal on this basis is proper, but the court does not recommend dismissal with prejudice because plaintiff's vague allegations do not reveal whether the district attorney stepped outside of his role as a prosecutor in effecting the warrant. *See Kalina*, 522 U.S. at 129-31 (district attorney acted as witness and not entitled to prosecutorial immunity for making false statement of fact in affidavit supporting application for arrest warrant); *but see Cruz v. Kauai County*, 279 F.3d 1064, 1067 n.4 (noting that use of third party affidavit may preserve prosecutorial immunity). Regardless of the manner of request, a judicial officer is

entitled to absolute immunity for the grant of such a warrant. *Burns v. Reed*, 500 U.S. 478, 492 (1991) (issuance of a warrant "is unquestionably a judicial act").

IV. CONCLUSION

For the reasons articulated above, the court finds that the State of Nevada is not amenable to suit. On this basis, plaintiff is unable to bring an action for damages against Governor Sandoval for actions taken in his official capacity. Additionally, Governor Sandoval, Douglas County, and John Does 1-2 cannot be held liable under a theory of respondeat superior as a matter of law. Finally, plaintiff's remaining claims against the district attorney are barred by the *Heck* doctrine because a judgment in his favor would imply the invalidity of his pretrial detention. The court recommends that plaintiff's claims be dismissed without prejudice, without leave to amend to provide plaintiff with the opportunity to bring his action at a later date, should he be able to correct the deficiencies outlined above.

The parties are advised:

1. Pursuant to 28 U.S.C. § 636(b)(1)(c) and Rule IB 3-2 of the Local Rules of Practice, the parties may file specific written objections to this Report and Recommendation within fourteen days of receipt. These objections should be entitled "Objections to Magistrate Judge's Report and Recommendation" and should be accompanied by points and authorities for consideration by the District Court.

2. This Report and Recommendation is not an appealable order and any notice of appeal pursuant to Fed. R. App. P. 4(a)(1) should not be filed until entry of judgment.

V. RECOMMENDATION

IT IS THEREFORE RECOMMENDED that plaintiff's applications to proceed *in forma pauperis* (ECF No. 1) be **GRANTED**;

IT IS FURTHER RECOMMENDED that the Clerk **FILE** plaintiff's complaint (ECF No. 1-1);

IT IS FURTHER RECOMMENDED that the claims against the State of Nevada be **DISMISSED WITH PREJUDICE**;

IT IS FURTHER RECOMMENDED that the claims for damages brought against Governor Sandoval in his official capacity be **DISMISSED WITH PREJUDICE**;

IT IS FURTHER RECOMMENDED that the complaint be **DISMISSED WITHOUT PREJUDICE, WITHOUT LEAVE TO AMEND** as to **COUNT I, II, III, and IV** against all defendants.

IT IS FURTHER RECOMMENDED that the Clerk **ENTER JUDGMENT** and close this case.

DATED: March 2, 2018

UNITED STATES MAGISTRATE JUDGE